United States Court of Appeals

for the Second Circuit

INTERVENOR'S REPLY BRIEF

ORIGINAL

No. 75-4089
No. 75-4121

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-4089

AMERICAN BROADCASTING COMPANIES, INC., CBS INC., and NATIONAL BROADCASTING COMPANY, INC.,

Petitioner,

and

ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.,

Intervenor,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

(Caption continued on inside front cover)

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P/S

Answering Brief of the Association of Motion Picture and Television Producers, Inc.

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vs.

WRITERS GUILD OF AMERICA, WEST, INC.,

Respondent.

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Answering Brief of the Association of Motion Picture and Television Producers, Inc.

I.

STATEMENT OF THE CASE.[1]

A. NATURE OF THE CASE, PROCEEDINGS AND DISPOSITION BELOW.

The proceedings before this Court arise out of the petition of the American Broadcasting Companies, Inc., the Columbia Broadcasting System, Inc., and the National Broadcasting Company, Inc.,[2] pursuant to Section 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. Section 160(f),[3] for the review of a decision and order of the National Labor Relations Board, and the petition of the National Labor Relations Board, pursuant to Section 10(e) of the Act, 29 U.S.C. Section 160(e), for the enforcement of that same decision and order. These petitions were consolidated for all purposes by order of the Court, dated June 26, 1975. And on July 1, 1975, the Court ordered that the motion to intervene herein by the Association of Motion Picture and Television Producers, Inc., be granted.

By its decision and order, issued May 13, 1975,[4] the Board found that the Union violated Section 8(b)

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[1]Pursuant to Rule 28(b) of the Federal Rules of Appellate Procedure, the Association of Motion Picture and Television Producers, Inc. adopts the Statement of Issues as contained in the brief of the National Labor Relations Board and for that reason does not include its own Statement of Issues herein.

[2]The American Broadcasting Companies, Inc., the Columbia Broadcasting System, Inc., and the National Broadcasting Company, Inc., will hereinafter be referred to as the "Networks". The National Labor Relations Board will hereinafter sometimes be referred to as the "Board" and the Administrative Law Judge will hereinafter sometimes be referred to as the "ALJ". The Association of Motion Picture and Television Producers, Inc., and the Writers Guild of America, West, Inc., will be referred to respectively as the "Association" and the "Union".

[3]All relevant statutes are set forth in Addendum A attached hereto.

[4]217 NLRB No. 159.

(1)(B) of the Act, 29 U.S.C. Section 158(b)(1)(B), by restraining and coercing employers in the motion picture and television industry in their selection of representatives for the purpose of collective bargaining or the adjustment of grievances[5] (Appendix 124; Appendix 181).[6]

The Union has failed to comply with the Board's remedial order, and the Board has, therefore, brought this action to enforce its order. The Association fully supports the findings and conclusions of the Board, that the Union's conduct was violative of Section 8(b)(1)(B), and submits that the Board's order should be enforced by this Court.

B. STATEMENT OF FACTS.

1. Charges, Complaints, ALJ Decision and Board Order.

a. Charges and Complaints.

On March 8, 1973, the Association filed a charge with the Board in Case No. 31-CB-1203-2 (GCX 1(a)) alleging that the Union had threatened super-

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[5]The employers found to be so coerced included the employer members of the Association, the Networks, and QM Productions. While the acts of the Union that were held to be violative of Section 8(b)(1)(B) of the Act as to the employer members of the Association closely parallel the acts of the Union that were held to be violative of the Act as to the Networks and QM Productions, this brief will deal primarily with the former and is filed only on behalf of the Association.

[6]In the printed brief, references to the Decision and Order of the National Labor Relations Board and the Administrative Law Judge's Decision and Recommended Order will be to the accompanying appendix. References to the official transcript of the hearings before the Administrative Law Judge will be designated "Tr.". References to the General Counsel's Exhibits will be designated "GCX". References to the exhibits of other parties will be as follows: Association Exhibits "AX"; Union

(This footnote is continued on next page)

visory employees of the employer members of the Association with fines and other disciplinary actions if they crossed the Union's picket lines to perform work in any capacity for their respective employers, and had thereby restrained and coerced the Association, through its employer members, in their selection of representatives for the purpose of collective bargaining or the adjustment of grievances in violation of Section 8(b)(1)(B) of the Act. A complaint consolidating this case with Case No. 31-CB-1223[7] (GCX 1(e)) was issued by the Regional Director on behalf of the General Counsel of the Board on April 18, 1973.

Hearings commenced before the ALJ on May 21, 1973, and continued thereafter on May 23-25, June 4-5, June 8, June 11, June 13 and November 19, 1973.

On June 16, 1973, the Association filed a charge with the Board in Case No. 31-CB-1316 (GCX 13(c)) alleging that the Union had issued notices of disciplinary hearings and charges against certain of its employer members' supervisory employees, held intraunion trials, and meted out discipline in the form of fines, suspensions and expulsions in further violation of Section 8(b)(1)(B). A complaint consolidating Case Nos. 31-CB-1313[8] and 31-CB-1316 was issued by the Regional Director on July 25, 1973 (GCX 13(e)), and an order consolidating these cases with Case Nos. 31-CB-1203-2 and 31-CB-1223 was issued by the ALJ on August 10, 1973 (GCX 13(j)).

Exhibits "RX"; and the stipulation of facts entered into by all parties to the consolidated proceedings before the ALJ "JX".

[7]The charge in Case No. 31-CB-1223 was filed by the Networks on April 4, 1973.

[8]The charge in Case No. 31-CB-1313 was filed by the Networks on July 11, 1973.

An order consolidating all of the above cases with Case No. 31-CB-1355[9] was issued by the ALJ on November 26, 1973, and a second amended consolidated complaint was issued by the Regional Director on December 11, 1973.

Insofar as it relates to the Association, the second amended consolidated complaint alleged the following:[10]

(1) That the employer members of the Association and the Union were parties to a collective bargaining agreement which by its terms was effective until June 15, 1973, but which was prematurely terminated by the Union on March 4, 1973 (Appendix 9 ¶8(a));

(2) That from March 4 to June 24, 1973, the Union struck the Association and its employer members and picketed certain of those employer members' premises (Appendix 11-12 ¶10(a));

(3) That the employer members of the Association employed executives, executive producers, producers, associate producers, directors, research directors and story editors, who were supervisors and representatives of their respective employers for the purpose of collective bargaining or the adjustment of grievances within the meaning of the Act (Appendix 10-11 ¶9(a));

(4) That in February, 1973, the Union prepared, published and distributed to all of its members, including those supervisorial employees em-

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[9]The charge in Case No. 31-CB-1355 was filed by QM Productions on September 5, 1975.

[10]The allegations of the second amended complaint as to the Association are paralleled by allegations as to the other charging party employers, the Networks and QM Productions.

ployed by the employer members of the Association, Rules for the Conduct of Members During a Strike (Appendix 12-13 ¶11);

(5) That through its agents the Union told these supervisory employees that the strike rules applied to them regardless of the capacity in which they worked (Appendix 8-9 ¶6; Appendix 13 ¶12);

(6) That beginning in early March, 1973, the Union through its agents threatened to fine, blacklist and otherwise discipline; charged; tried; and did in fact fine, blacklist and otherwise discipline, various of these supervisory employees who crossed the Union's picket lines to perform work for their respective employers (Appendix 8-9 ¶6; Appendix 13-14 ¶13(a), (b) and (c)); and

(7) That by these acts the Union restrained and coerced the employer members of the Association in their selection of representatives for the purpose of collective bargaining or the adjustment of grievances in violation of Section 8(b)(1)(B) of the Act (Appendix 15-16 ¶14; Appendix 16 ¶16).

In its answer to the second consolidated amended complaint, the Union admitted all of the allegations of the complaint, with the following exceptions:

(1) That the affected executives, executive producers, producers, associate producers, directors, research directors and story editors were supervisors and representatives of their respective employers for the purpose of collective bargaining or the adjustment of grievances within the meaning of the Act (Appendix 24-25 ¶3);

(2) That the Union threatened to adopt and did adopt a blacklist[11] (Appendix 24 ¶2); and

(3) That the Union violated Section 8(b)(1)(B) of the Act (Appendix 24 ¶2).

Subsequent to this answer, the case was submitted to the ALJ for decision without further hearing, upon a factual stipulation entered into by all parties on December 17, 1973 (Appendix 29).

b. Decision of the Administrative Law Judge.

It is in the above-described context that the Administrative Law Judge issued his Decision and Recommended Order on September 18, 1974, concluding that the Union had in fact violated Section 8(b)(1)(B) by restraining and coercing the employer members of the Association, in their selection of representatives for the purpose of collective bargaining or the adjustment of grievances.[12] (Appendix 181).

The ALJ found that the executive producers, producers, associate producers, directors and story editors employed by the employer members of the Association are supervisors and adjust the grievances of employees, including writers, within the meaning of the Act. (Appendix 139-140; 142-143).

The ALJ also found the evidence to show that during its strike the Union was particularly concerned that these supervisory members not cross its picket lines, or go to work for the struck employers. (Appendix

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[11]In its answer to the Consolidated Complaint, dated May 1, 1973, the Union admitted that it adopted the threat of a blacklist as a part of its strike rules.

[12]As with the complaint, the findings of the ALJ with respect to the Association are paralleled by findings as to the Networks and QM Productions.

136). Therefore, the ALJ found, the Union adopted its strike rules which, in essence forbade these supervisory members, as well as other members of the Union, from "doing any work of any sort for employers on strike nor to cross picket lines to go upon the premises of such employers". (Appendix 135).

The ALJ further found that by means of meetings and newspaper articles, as well as through personal contact, letters and telegrams, the Union's supervisory members were advised that all of the strike rules were applicable to and would be enforced against them, (Appendix 151), particularly strike rule 30 which provided:

> "No member shall work with any individual, including a writer-executive who has been suspended from Guild membership by reason of his violation of strike rules, or has been found by the Council to have violated strike rules, in the event no disciplinary action was instituted against such person". (Appendix 17-23; 151).

The supervisory members were found by the ALJ to be particularly vulnerable to the application of strike rule 30 "because in their primary work as producers, directors, story editors, and executives, they would be unable to effectively function in the future if writer-members of Respondent [Union] refused to work for or with them". (Appendix 152; 169).

The ALJ found that the employer members of the Association ordered their supervisory employees, members of the Union, to fulfill their contractual obligations as supervisors and report to work notwithstanding Union picket lines or other pressure brought to bear upon them by the Union. The supervisory employees were

informed by their employers that they would not be called upon to perform any writing services during the strike (Appendix 154-155).

The Union's claim that supervisory members who went to work during the strike engaged in the performance of bargaining unit writing services, even though such functions as they performed had been expressly excluded from the Collective Bargaining Agreement, was specifically rejected by the ALJ's finding that by excluding certain writing functions from the Agreement, the parties had recognized that such functions did not constitute bargaining unit work reserved solely to rank and file members of the Union, but rather had acknowledged that such writing functions were a normal part of the duties and responsibilities of the supervisory members (Appendix 148).

c. Exceptions to the Decision of the ALJ and Decision of the Board.

The Union filed exceptions to certain portions of the ALJ's decision. These exceptions may be summarized as follows:

> The Union excepted to the ALJ's finding that producers adjust or potentially may adjust grievances involving writers. (Union "Findings" Exceptions Nos. 1, 2). A related exception made by the Union was to the finding that story editors adjust the grievances of writers and other employees. (Union "Findings" Exception No. 3).
>
> The Union also excepted to the finding of the ALJ that the so-called "[a] through [h]" writing functions are a normal part of the duties and responsibilities of the supervisors employed by the employer members of the Association and are

not bargaining unit work. (Union "Analysis" Exception No. 1 and "Findings" Exception No. 4).

Finally, the Union excepted to the finding of the ALJ that the Union violated Section 8(b)(1)(B) of the Act. (Union "Conclusions" Exception No. 1 and "Analysis" Exception No. 3).

Though supporting the ALJ's Decision and Recommended Order, the Association and the Networks each filed separate exceptions to certain portions of the decision. Specifically, the Association raised the following exceptions:

The Association excepted to the failure of the ALJ to sustain the allegations of the second consolidated amended complaint with respect to executives and research directors employed by the employer members of the Association. (Association Exception No. 1).

The Association also excepted to the finding of the ALJ that the Union effectively rescinded Strike Rule 30, and to the ALJ's failure to find that this rule was thereafter republished by the Union. (Association Exception No. 2).

Finally, the Association excepted to the failure of the ALJ to order that the Union undertake the performance of certain affirmative remedies. (Association Exceptions No. 3, 4 and 5).

In its Decision and Order, the Board affirmed and adopted the findings and conclusions of the Administrative Law Judge, except that the Board deemed meritorious the Association's exception as to executives and research directors and therefore sustained the complaint's alleged violations of Section 8(b)(1)(B) *in toto* (Appendix 123-124).

2. Supervisory and Management Representative Functions of Executives, Executive Producers, Producers, Associate Producers, Directors, Research Directors and Story Editors.[13]

The evidence adduced at the hearing below as to the functions of the various supervisory employees of the employer members of the Association was extensive. Though there may be some minor differences between the method of operation of one producer and another producer, or one director and another director, the evidence presented in the proceedings is generally descriptive of the functions of executives, executive producers, producers, associate producers, directors, research directors and story editors employed by the employer members.

a. Supervisory and Management Representative Functions of Executive Producers, Producers, Associate Producers, Directors and Story Editors.

As will be more fully discussed below, the vast majority of the threatened and disciplined supervisory members of the Union were employed in the capacities of executive producer, producer, associate producer, director or story editor.

The *executive producer* supervises several projects, from a management level, throughout pre-production,

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[13]In the motion picture and television industry, it is not unusual to find an individual who is competent to perform more than one function. Thus an actor may also be a director or a writer, or a producer may also be an actor or a writer. Such multi-talented individuals are known as "hyphenates". It is with the hyphenate members of the Union who are employed in supervisory functions by the employer members of the Association—those executives, executive producers, producers, associate producers, directors and story editors who are also writers and members of the Union—that this case is concerned.

production and post production (Tr. 60:1-17; 312:16-23; 399:1-14). It is the function of the executive producer, who is almost completely a product of television, to supervise several producers, each of whom is working on one or more segments of a television series (Appendix 140; Tr. 313:2-4).

The *Producer* supervises a project through conception, planning, production, post production and exploitation (Tr. 198:15-199:16).

The *associate producer,* as his title implies, assists the producer, especially in those areas where the producer may be lacking in experience or expertise (Appendix 140; Tr. 202:21-203:9).

The *director* is primarily responsible for the physical production of a motion picture or television production (Tr. 62:24-63:4).

The *story editor,* also variously known as an executive story editor or a story consultant (Appendix 142; Tr. 248:1-18), is of principal assistance to the producer in the highly important functions of dealing with scripts and writers (Appendix 142). As with the executive producer classification, story editors are found much more commonly in television than in motion picture production (Appendix 142-143).

In order to fully understand the inter-relationship of the above-referred to job classifications, as well as their relation to the other personnel involved in the planning and execution of a movie or television production, it is helpful to trace such a movie or television production from its inception to its exploitation.

(i) *Pre-Production*

The first step in the production of a motion picture or a televison production is the selection of a

story. In the motion picture area a story premise may be thought of by a producer, who then hires a writer to develop it; or the producer may hire a writer to create the premise; or the story premise may be assigned to a producer by his employer (Appendix 139; Tr. 55:4-22; 199:17-200:5).

In the television area, the story editor has primary responsibility for the acquisition of story ideas (Tr. 209:20-23; 353:6-14). While the producer has ultimate authority in this area, he is usually involved in several programs at one time and therefore cannot devote as much energy to this function as in the motion picture area (Tr. 345:21-25; 350:4-11; 351:21-352:8; 418:2-11; 975:8-22; 986:18-23; 990:10-13). Thus, the story editor, based upon his knowledge of the writers available and the nature of the show that is being produced, prepares a list of writers he believes might be interested in and be able to develop appropriate material (Tr. 209:24-210:3; 354:15-23; 567:17-568:4; 1179:10-15). The story editor then meets with these writers and listens to them read their story premises (Tr. 470:11-12; 1180:16-25; 1226:5-13). The story editor recommends the employment of those writers whose premises appear to be promising (Appendix 142; Tr. 67:20-23; 534:9-22; 470:20-471:2; 1178:2-21), which recommendations are generally accepted (Tr. 535:13-14; 568:5-22).

The ultimate decision as to the hiring of a writer may be made by the executive producer, the producer or the associate producer, or by a creative management team comprised of all three (Tr. 161:1-7; 231:24-235:19; 331:14-21; 338:22; 461:23-462:14; 535:13-14; 568:5-22).

The writer who is hired proceeds to prepare a story outline. During this period, the producer, associate producer, story editor, and the director, meet with the writer in a series of story conferences at which recommended changes are discussed (Tr. 56:6-11; 67:24-68:2; 349:11-350:3; 439:2-6; 570:13-15; 1182:24-1186:4). These changes may encompass any of a number of items: an alteration in direction or approach to the story; in television, a change in a story to achieve continuity with a pre-existing story line or characterization; or changes in locations, types of sets or the number of actors required in order to insure economic viability of the project (Tr. 56:6-21; 68:16-69:3; 72:3-21; 161:8-14; 389:2-21; 391:3-8). Based upon these recommendations, suggestions and directions, the writer prepares a final story outline (Tr. 1186:5-9). Throughout, the story editor works with the writer to assure that the writing is proceeding according to schedule (Tr. 161:15-23).

Upon presentation of the final story outline, the writer has fulfilled his contractual commitment (Tr. 1192:5-10). However, the employer member may exercise an option to have the writer prepare a complete script based upon the story outline. This decision, as with the initial decision to hire the writer, may be made by either the executive producer or the producer, upon the effective recommendation of the story editor, or by the entire creative management team (Appendix 142-143; Tr. 161:1-7; 212:8-11; 571:10-572:4; 986:5-17). If the option is not exercised, the writer is effectively terminated. If the option is exercised, the writer prepares a complete screenplay or teleplay in a process similar to the preparation of the final story outline (Tr. 1196:25-1197:19).

Any grievances that a writer may have are usually adjusted, in the first instance, by the story editor (Appendix 143). Thus when a story outline or a script has to be rewritten, the story editor is expected to ameliorate the writer's feelings if he cannot understand the reason why (Tr. 471:3-11; 570:23-571:9). If there is a dispute about screen credits, the initial determination is made by the story editor (Appendix 143; Tr. 236:11-24; 335:17-336:9). If the writer is not satisfied with the story editor's disposition, the producer will be called upon to adjust the matter (Appendix 143; Tr. 165:6-166:9). While the final disposition of a screen credit dispute is made by the Union (GCX 2, Theatrical Schedule A §18), the story editor and the producer are responsible for the management disposition of these matters (Tr. 355:16-356:9; AX 11). And the story editor and/or the producer may be called upon to resolve the question of whether a writing commitment has been made to a writer (Appendix 139; Tr. 165:6-166:9).

While the script is being written, the producer (together with the executive producer, in television) starts to assemble the production team. A director and an associate producer are hired (Tr. 201:7-11; 312:24-313:1; 390:14-19; 418:12-14; 461:23-462:7; 548:3-9). Actors and key below-the-line personnel, including the wardrobe head, the art director, the set director, the director of photography, the assistant director and the cameraman are hired by the executive producer, the producer, the director, or by a creative management team composed of all three (Appendix 139; Tr. 58:12-25; 205:20-206:15; 231:24-232:18; 268:2-269:5; 331:14-332:5; 395:10-21; 461:23-462:7; 793:19-794:9; 849:22-23).

The producer and the director, together, in television with the executive producer, prepare a budget for the project (Appendix 139; Tr. 82:20-84:8; 207:15-208:7; 312:24-313:7; 390:25-391:8; 558:18-19). It is of note, that the cost of a one-hour television show may be as much as $225,000 (Tr. 227:10-23), and the budget for a motion picture often runs into the millions. Once the budget is set, the producer must determine the economic feasibility of the project. If feasible, the producer and the director, together with the production department work out a shooting schedule—breaking down the script scene by scene, establishing a shooting order, and determining the amount of shooting to be done each day (Tr. 84:23-85:10; 207:15-208:7). It can then be determined if the budget is excessive, and if so the producer may order rewriting in order to cut superfluous scenes or employ sets that have already been built (Tr. 85:11-17; 391:3-8).

(ii) *Production.*

The primary responsibility for the actual, physical production of a motion picture or television production and the supervision thereof is in the hands of the director (Appendix 142; Tr. 262:24-263:4). The director, as the name implies, directs actors and members of the production crew throughout every step of production. The director, for instance, directs actors as to how and where to stand and how to read lines; the cameraman as to the appropriate camera angle for a particular shot; and the grip as to the placement of lights (Tr. 263:11-17; 205:15-19). The director is responsible for everything that occurs during production.

The executive producer, producer and associate producer also have roles to play in the physical production stage.

The producer generally supervises and oversees production (Tr. 252:12-14). When a production company is on location in a geographic area where there is no pre-existing collective bargaining agreement, the producer negotiates interim, short-term collective bargaining agreements with local labor unions (Appendix 139-140; Tr. 167:9-13; 168:4-19; 216:4-19; 559:9-25; 794: 10-22).

The producer authorizes overtime shooting—deciding which actors and crew members to hold over and which to send home (Tr. 285:22-287:11). In some cases, the director will make these decisions jointly with the producer, and in the absence of the producer, these decisions are made solely by the director (Tr. 287:3-288:1). If the possibility of overtime involves large sums of money, the ultimate decision may be made by the executive producer (Tr. 88:4-6). The producer or the director approve or disapprove requests for time off from actors and crew members (Tr. 89: 11-22; 289:4-22).

The executive producer, producer, associate producer and director are all involved in the adjustment of the many grievances that arise during the making of a motion picture or television production. A number of these grievances involve actors. An actor may not like certain parts of a script, or he may be discontent with his dressing room, or his wardrobe (Tr. 240:10-241:25; 242:4-19; 421:20-422:17; 885:5-853:6). An actor may resist or resent direction, or may not like how a scene is staged, or how the production crew

is working (Tr. 241:6-9; 420:5-421:19; 439:19-440:20). An actor may not be happy with a particular stuntman or the director may order him to perform a stunt for which he thinks a stuntman should be used (Tr. 204:9-205:4; 739:9-10). A stuntman may demand additional compensation for a particularly dangerous stunt (Tr. 344:20-345:8; 551:6-15; 792:6-15); the same may be true of an extra (Tr. 442:10-16; 736:23-737:3).

In addition to grievances involving actors, grievances often arise as to and between the members of the production team. One of the most common of these is a creative disagreement between the director and the cameraman (Tr. 314:8-11; 332:18-21; 400:6-13; 550:14-551:5). The art director may believe that the set director has not properly executed his work (Tr. 400:18-22). Or there may be jurisdictional disputes between the various craft unions (Tr. 262:11-12).

When any of these grievances arise, they are handled in the first instance by either the associate producer or the director (Appendix 142; Tr. 264:6-22; 274:23-275:13; 467:15-24; 735:22-736:7). If they are not resolved at this level or if they involve significant financial and/or creative questions, they are referred to the producer for adjustment (Appendix 140; Tr. 270:25-271:10; 560:22-561:3). When a grievance cannot be adjusted by the producer, in the usual case, the executive producer is the court of last resort (Tr. 313:9-15; 314:2-4). However, in case of a grievance which has a major financial or creative effect, the grievance may be finally adjusted by one of the employer's higher executives (Tr. 892:4-11).

(iii) *Post Production.*

While principal photography is being completed, the post production staff—film editor, dubbing editor, looping editor, composer and conductor—is being assembled. Once again, the manning decisions are made by the creative management team (Tr. 59:16-19; 202:5-8; 392:10-11; 419:9-13), although the recommendations of the associate producer carry particularly substantial weight in this area (Tr. 562:3-5).

The immediate supervision of post production work is done by the associate producer. He attends and supervises the recording and looping sessions (Tr. 440:25-441:6; 562:23-563:2), and supervises the sound cutters, effect cutters and looping editors (Tr. 562:12-15).

While the associate producer has considerable authority in the post production area, he is responsible to the producer and to the executive producer (Tr. 419:5-16; 548:16-17). It is the producer who sets the editorial style of the project and who determines the amount and type of music to be used (Tr. 59:16-22; 202:5-8; 392:10-12). Together with the executive producer, the producer views the "dailies", directs the editors as to changes to be made, and orders any additional shooting he feels is necessary (Tr. 59:16-22; 418:22-419:2; 548:14-15). The producer and the executive producer work with the employer and/or the television network in the sale and exploitation of the completed project (Tr. 202:11-18; 392:13-20; 548:21-23).

b. Supervisory and Management Representative Functions of Other Executives.

The functions of the other executive personnel of the employer members vary one from another, but a few specific examples may serve to explain the functions of these employees. While not meant to be exhaustive, these examples do give an indication of the scope of work performed by executives of the employer members of the Association.

Thus, the research director supervises background research for movies and television (Tr. 597:12-598:1), and reads all scripts to protect against the possibility of invasion of privacy, libel and plagiarism (Tr. 598:7-14). The research director has complete authority to hire and fire the personnel working under him (Appendix 123; Tr. 598:16-22), and to adjust their grievances (Appendix 123; Tr. 598:23-599:3; 599:14-25).

Frank Price is Senior Vice-President of Universal T.V. Mr. Price is not involved in the actual making of motion pictures or television productions, but those who are so involved report to him (Tr. 108:23-25). One of Price's major responsibilities is in the area of contract negotiations with the Union and with other labor organizations.

Sidney Kalcheim is the Executive Assistant to the Vice-President in Charge of The Burbank Studios (Tr. 891:20-892:3). In this position, Mr. Kalcheim does no writing (Tr. 893:16-20). His duties involve the negotiation of contracts with writers, directors and producers; the acquisition of rights to literary material; overseeing the general administration of the studio, and being a general trouble shooter (Tr. 892:4-11).

3. The Dispute.

a. The Collective Bargaining Agreement and Its Termination.

On June 16, 1970, the Union and the employer members of the Association renewed their ongoing collective bargaining relationship, entering into a collective bargaining agreement entitled 1970 Theatrical and Television Film Basic Agreement (GCX 2). This agreement, which sets forth the wages and working conditions for writers in the motion picture and television industry, specifically excluded from its coverage "the employment of Producers, Directors, Story Supervisors[14] . . ." (Appendix 146; GCX 2, Article 1(a)(ii)). The agreement also excluded from its coverage the following writing services when performed by a producer, director, story editor or any other non-bargaining unit employee:

> "(a) Cutting for time
>
> (b) Bridging material necessitated by cutting for time
>
> (c) Changes in technical or stage directions
>
> (d) Assignment of lines to other existing characters occasioned by cast changes
>
> (e) Changes necessary to obtain continuity acceptance or legal clearance
>
> (f) Casual minor adjustments in dialogue or narration made prior to or during the period of principal photography
>
> (g) Such changes in the course of production as are made necessary by unforeseen contingencies (e.g. the elements, accidents to performers, etc.)

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[14]Herein referred to as story editors.

(h) Instructions, directions, or suggestions, whether oral or written, made to writer regarding story or teleplay" (Appendix 146-147; GCX 2, Article 1(B)(1)(a)(2) through (h)).[15]

The collective bargaining agreement between the Union and the employer members of the Association was to expire by its terms on June 15, 1973. However, pursuant to Article 15(a)(4)(B) thereof (GCX 2), it was prematurely reopened by the Union and terminated effective March 4, 1973 (Appendix 134; AX 8), three months prior to its stated expiration date.

b. The Union's Strike Preparation.

Having given notice of its intent to terminate the agreement, the Union commenced preparation for a strike against the Association, which in fact began on March 5, 1973 (Appendix 143).

On February 2, 1973, the Board of Directors of the Union, pursuant to Article 4, Section 5(3) of the Union Constitution and By-Laws,[16] and in obvious anticipation of the strike which it called on March 4, reactivated all of its members who had been placed on Withdrawn status[17] within the two preceding years

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[15]In the motion picture and television industry, these editing functions are referred to as the "[a] through [h] functions" and will be so referred to herein (Appendix 146-147).

[16]This section provides that "after notice to any such member [a member on Withdrawn status] and for good cause the Council may restore such member retroactively or otherwise to the status held by him at the time of application for Withdrawn status".

[17]There are four classes of membership in the Union—Associate, Current, Guild Member and Withdrawn (GCX 12(a), Article IV). Under the Union's Constitution and By-Laws, effective as of December, 1972 (the Constitution and By-Laws in effect during the events relevant to this proceeding), Associate Members of the Union received Union benefits, but

(Appendix 136; Tr. 931:9-17; AX 5, AX 5a). The Union also adopted a policy whereby it would not permit any member to resign until at least six months after the conclusion of collective bargaining between the employers and the Union (Appendix 30).

This policy was promptly implemented by the Union when on January 22, 1973, Herman Saunders, the producer of "Adam-12" for Universal City Studios, Inc. and then a member of the Union, sent a letter to the Union's Membership Committee seeking to resign from the Union on the basis that *for five years he had done no writing* and had functioned solely as a producer[18] (Appendix 137; AX 2).

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had no right to vote, hold office, or be members of Union or Branch Committees (GCX 12(A), Article IV §6(1)). Current Members of the Union received Union benefits, and had the right to vote, hold office, and to be members of Union and Branch Committees (GCX 12(A), Article IV §§6(2) and (3)). Guild Members of the Union had rights and benefits similar to those of Associate Members (GCX 12(A), Article IV §6(4)). Withdrawn Members of the Union received only those benefits granted them by the Union Council, and had no right to vote, hold office, or be members of Union or Branch Committees (GCX 12(A), Article IV §6(5)). Virtually all of the relevant supervisory employees in these proceedings were Associate Members of the Union (Appendix 136; Tr. 339:18-23; 536:9-13; 601:11-12; 746:8-17; 893:10-15), since they had done insufficient writing in recent years to qualify as either current or Guild Members (GCX 12A, Article IV §§ 1 and 2).

[18]In like manner, *many of the executives, executive producers, producers, associate producers, directors, research directors, and story editors with whom this case is concerned had done no writing whatsoever for a considerable number of years.* These supervisory employees received no "substantial benefit from their membership in Respondent [Union], except that derived from being part of the writing community . . ." and "the results of the [Union's] strike would be of only problematic benefit to" them since the Union's agreement with the employer members of the Association did not cover their managerial and supervisory functions (Appendix 174).

On January 30, Michael Franklin, the Union's Executive Director, wrote to Saunders rejecting hs resignation "in accordance with Section 8 (sic) of Article IV of the Guild's Constitution and By-Laws". Franklin noted that Saunders' membership in the Union was to continue, pursuant to the policy of the Union, for at least six months following the conclusion of the negotiations between the employers and the Union at which time Saunders could again tender his resignation (Appendix 137; AX 3).

In mid-February, Saunders related the account of his abortive resignation attempt to some sixty supervisory members of the Union at a meeting called and chaired by Robert Cinader of Universal (Appendix 137; Tr. 748:8-750:5).

In late February, 1973, the Union prepared and adopted "Rules for Conduct of Members During a Strike". Prior to the distribution of these rules, they were voted on at a general membership meeting of the Union (Tr. 371:3-9); however, as Associate Members, most of the supervisory members were denied the right to vote on their adoption (Appendix 136; Tr. 340:12-24; 349:5-6; 747:5-7). The strike rules were distributed to all of the members of the Union, regardless of their status as Associate Members, Current Members, Guild Members or Withdrawn Members, and regardless of their employment as supervisors or rank-and-file employees (Appendix 148-159; GCX 3).

The strike rules as adopted provided, in part, that:

> "1 Any act or conduct which is prejudicial to the welfare of the Guild is subject to disciplinary action. Conduct tending to defeat a strike or in any way weaken its effectiveness is per se conduct prejudicial to the welfare of the Guiid.

12 All members are prohibited from crossing a picket line which is established by the Guild at any entrance to the premises of a struck producer.

13 *Members are prohibited from entering the premises of any struck producer for the purpose . . . of viewing any film whether it be a completed picture, stock footage, television pilot . . .* Should a member find it necessary to visit the premises of a struck producer for any reason apart from the foregoing he should inform the Guild in advance of the nature of such prospective visit.

14 Members may not accept from a struck producer for reading, perusal, study or any other purpose any sample script, format, presentation or literary material of any nature which might have any actual or potential connection with future employment of said members as writers *or otherwise* even though such services are to begin after the conclusion of the strike.

* * *

19 A member may not, during the course of a strike, conduct negotiations with a struck producer for financing the production of any of his literary material or scripts or for his participation in such production *in any capacity.*

22 *A member is chargeable with knowledge of all strike rules* and regulations . . . *made known to the entertainment industry through any recognized medium of communication such as trade papers, newspapers. . . .*

24 *All members, regardless of the capacity in which they are working,* are bound by all strike rules and regulations in the same manner

and to the same extent as members who confine their efforts solely to writing.

25 *A member may not,* during a strike, *attempt to* solicit or *negotiate in behalf of a struck producer* for the services of a writer, whether a member or not, or for the purchase of literary material, whether or not written by a member.

26 *The term 'member' encompasses anyone admitted to the membership rolls* of the Writers Guild of America, both West and East, and classified as either *active or inactive, associate, withdrawn or suspended,* whether in good standing or bad.

27 No member may be relieved of the responsibility for the payment of any fine, or from any disciplinary action resulting from any infraction of strike rules by offering his resignation from the Guild. *Membership in any guild or union is* not a voluntary association of parties but *a binding contract between them which cannot be abrogated unilaterally except under provisions of the Guild constitution. . . .*

* * *

29 Any member of the Guild who shall be found guilty, after a hearing conducted in accordance with the procedures herein prescribed, of any act or failure to act, or any conduct which is prejudicial to the welfare of the Guild, or any of its Branches . . . or of failing to observe the Constitution and By-Laws . . . may be suspended, declared not in good standing, expelled from membership in the Guild, be asked to resign in lieu thereof, or in addition thereto, he may be censured, fined or otherwise disciplined.

30 *No member shall work with any individual, including a writer-executive who has been suspended from Guild membership by reason of his violation of strike rules, or who has been found by the Council to have violated strike rules, in the event no disciplinary action was instituted against such person".* [Emphasis added]. (Appendix 17-23; 149-151).

On February 15, 1973, the Union held a meeting for supervisory members at which Michael Franklin told them that the strike rules applied to them not only as writers, but in each and every capacity in which they might function, including their supervisory capacities (Tr. 367:11-23; 369:25-370:14; 372:7-8; 375:14-376:15; 446:18-448:7).

After adopting and distributing the strike rules, the Union wasted little time in undertaking to apply them. Commencing in late February, 1973, Herbert Wright, a supervisory member of the Union, had a telephone conversation with Allen Griffiths, Assistant Executive Director of the Union, during which Griffiths told him that the strike rules applied to him even though he was a producer at Universal, that he would be subject to discipline if he crossed the picket line and would very likely be expelled from the Union, and that such a result would affect his future as a producer as henceforth no Union members would work with him (Appendix 151; Tr. 739:19-740:8; 768:3-769:18). Frank Paris, manager of the story department at Walt Disney Productions had a similar conversation with Carey Wilber, Co-Chairman of the Union Strike Committee (Appendix 152; Tr. 538:12-540:13; GCX 16 K, p. 32:22-36:35; Frank Pierson, director-producer at Universal, received a similar communique from Griffiths

(Tr. 856:23-857:3); and Michael Crichton, director at Metro-Goldwyn-Mayer, received the same message from John Furia, then Television Radio President of the Union (Tr. 613:8-615:9).

c. The Union's Strike and the Employers' Response.

The Union terminated the Agreement with the employer members of the Association on March 4, and thereafter and until June 24, 1973, struck these employers, and selectively picketed certain of their premises.[19] The employers sent letters to their supervisory employees stating that: "Should there be a strike . . . we expect you to fulfill your contractual obligations to us as a producer (director) (supervisor) and report to work notwithstanding any picket lines. . . . We trust that you understand that we will have no alternative but to resort to our legal rights and remedies in the event of a failure on your part to do so". (Appendix 154-155; GCX 26 A, B, C, D, E, F; GCX 27; and AX 10).

A number of the supervisors employed by the employer members of the Association refused to work during the strike. However, many of them crossed the picket line to perform their normal supervisory functions despite the Union's threats and intimidation.

d. The Union's Threats Against Supervisory Members Who Crossed Its Picket Lines.

In addition to the generally distributed threats contained in the widely publicized strike rules, the following supervisory members of the Union who were em-

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[19]The Union struck the Networks and QM Productions from March 29 to July 12 and from March 4 to March 17, 1973, respectively.

ployed by employer members of the Association were threatened by telephone and telegraph with discipline if they crossed the picket lines, even if they were to perform no writing functions whatsoever: David Victor, executive producer at Universal (Tr. 315:8-316:1; GCX 16 O, p. 90:24-92:17; 94:27-95:28); Herman Saunders, executive producer at Universal (GCX 16 J, p. 23: 21-26:1); Hugh Benson, producer at Metro-Goldwyn-Mayer, Inc. (GCX 16 F, p. 31:15-33:14); Jerome Bredouw, Director of Broadcast Publicity at Universal (GCX 16 C, p. 13:8-14:26); William Roberts, producer at Twentieth Century-Fox (GCX 16 H, p. 45:18-48:26); Jon Epstein, producer at Universal (GCX 16 D, p. 17:16-19:5); David S. Peckinpah, director at Metro-Goldwyn-Mayer (GCX 3); William Walsh, producer at Walt Disney (GCX 3).

Perhaps the most egregious of all of the Union's threats were those directed at Cy Chermack, executive producer at Universal. Chermack received a number of intimidating calls from Union officers (GCX 16 A, 62:8-9) and Chermack's wife was called by Brad Radnitz, a member of the Union Council, who told her that if Chermack worked during the strike the Union would end his career by not allowing other writers to work with him (Appendix 152; GCX 16 A, 62:1-8) The impact of this series of threats was so disquieting that both Chermack and his wife had to be placed under a doctor's care, and Chermack was actually hospitalized (GCX 16 A, 62:9-11). In addition, Chermack's name[20] appeared as a part of prominent stories carried on April 16, 1973, in the "Hollywood Reporter", "Variety" and the "Los Angeles

[20]Along with the names of Jack Webb, David Victor, Jon Epstein and Herman Saunders.

Times", in which Union spokesmen were quoted as stating that Chermack had been charged by the Union with having violated its strike rules by crossing the picket line and that if convicted, Chermack, and the others so charged, would appear on a "roll of dishonor", and be listed in Guild publications "in perpetuity so that Guild members for years to come will never forget . . . [the] pariahs who have betrayed their colleagues". (Appendix 152; AX 4(A), (B) and (C)).

e. The Union's Charges, Trials and Discipline of Supervisory Members Who Crossed Its Picket Lines.

Commencing on April 6, 1973, the Union began to issue Notices of Disciplinary Hearings and Charges against certain supervisory members, charging them with violating certain strike rules and ordering them to appear before a Union Disciplinary Board. Among those receiving such Notices were the following: David Victor, executive producer at Universal (GCX 4); Herman Saunders, executive producer at Universal (GCX 6); Michael Crichton, director at Metro-Goldwyn-Mayer (GCX 8); Hugh Benson, producer at Metro-Goldwyn-Mayer (GCX 15 A); Jerome Bredouw, Director of Broadcast Publicity at Universal (GCX 15 B); David Levinson, producer and executive at Universal (GCX 15 G); Albert Ruddy, producer at Paramount (GCX 15 I); Coles Trapnell, executive story editor at Universal (GCX 15 J); Cy Chermack, executive producer at Universal (GCX 15 R); Frank Paris, manager of the story department at Walt Disney (GCX 15 S); and Jon Epstein, producer at Universal (GCX 5). None of these Notices contained any allegation that the charged individuals had engaged in any bargaining unit writing whatsoever since the inception of the strike.

Pursuant to these Notices, the Union held intra-Union disciplinary hearings.[21] As a result of these hearings the following discipline was meted out by the Union's Board of Directors: David Victor was expelled from the Union and fined $50,000 (Appendix 158; GCX 17 I); Jon Epstein was expelled from the Union and fined $2,000 (Appendix 159; GCX 17 E); and Herman Saunders was expelled from the Union and fined $100 (Appendix 159; GCX 17 H). The position of the Union was that whether the supervisory members performed bargaining unit writing functions or solely supervisorial functions was immaterial (Appendix 156-157; GCX 16 O, p. 88:1-10; GCX 16 J, p. 21:22-28; GCX 16 H. p. 14:21-15:1). No proof of the performance of bargaining unit writing services by any of these individuals was elicited at their disciplinary hearings (Appendix 156-157; GCX 16 D; GCX 16 J; GCX 16 O).

Indeed, all of the evidence and testimony presented in the disciplinary proceedings was to the effect that the supervisory members of the Union were neither asked to write, nor in fact performed any bargaining unit writing services during the strike (Appendix 157; Tr. 320:19-323:6; 323:25-324:5; 325:18-25; 409:15-410:22; 634:11-14; GCX 16 B, 45:6-46:21; GCX 16 C, 73:13-26; GCX 16 D, 42:18-43:23; GCX 16 G, 55:20-23; GCX 16 I, 69:28-70:19; GCX 16 L, 70:24-27).

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[21]All intra-Union hearings were before Trial Committees of the Union. Members of these trial committees included Emmett Lavery, Irma Kalish, Nate Monaster, Barry Oringer, James Poe, Christopher Knopf, Michael Blankfort, Jack Ellinson; all of whom the Union admits were, at all relevant times, its agents (Appendix 24).

The Union, by press release, caused news of its fines and expulsions of Victor, Epstein and Saunders[22] to be prominently published in the June 27, 1973 editions of the "Los Angeles Times", "Daily Variety" and the "Hollywood Reporter" (Appendix 159; GCX 31; GCX 32; GCX 33).

Subsequent to the issuance of this press release, the Union issued Notices of Hearing and Disciplinary Charges against Robert Cinader, producer at Universal (GCX 15 D); Barry Crane, producer/director at Paramount (GCX 18); Herbert Wright, producer at Universal (GCX 15 K); Stephen Heilpern, associate producer at Universal (GCX 15 L); James McAdams, producer at Universal (GCX 15 M); Martin Ransohoff, producer at Paramount (GCX 15 N); Andrew Fenady, executive producer/producer/story editor at Bing Crosby Productions (GCX 15 O); Thomas Miller, producer at Paramount (GCX 15 Q); Lawrence Gordon, Vice President In Charge Of Worldwide Production at American International Pictures (GCX 15 R); Jack Haley, Jr., executive at Metro-Goldwyn-Mayer (GCX 15 U); and David S. Peckinpah, director at Metro-Goldwyn-Mayer (GCX 20). As with the earlier set of Notices, none of these contained any allegations that the charged supervisory members had engaged in any writing services whatsoever since the inception of the strike.

Further intra-Union hearings were held and the following discipline meted out by the Union Board of

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[22]These stories also contained news of Union fines and expulsions levied against supervisory employees of the Networks and of QM Productions (GCX 31; GCX 32; GCX 33).

Directors: Robert Cinader was fined $5,000 and suspended from the Union for three years (Appendix 159; GCX 17 J); Barry Crane was fined $10,000 and expelled from the Union (Appendix 158-159; GCX 19); David Levinson was fined $10,000 and suspended from membership in the Union for two years (Appendix 159; GCX 17 E). Also tried by the Union were Jerome Bredouw (GCX 16 C); Michael Crichton (GCX 16 E); William Roberts (GCX 16 H); Albert Ruddy (GCX 16 I); Frank Paris, manager of the story department at Walt Disney, (GCX 16 K); and Coles Trapnell, story editor at Universal, (GCX 16 L). As with the earlier proceedings involving Victor, Epstein and Saunders, there was no evidence presented at any of these hearings to establish the performance of any bargaining unit writing services by any of these individuals (GCX 16 B; GCX 16 E; GCX 16 G; GCX 16 I; GCX 16 K; GCX 16 L).

Pursuant to Article X §9(a) of the Union Constitution and By-Laws, Jon Epstein, Herman Saunders, David Victor, David Levinson, Robert Cinader, Hugh Benson and Barry Crane appealed the disciplinary action of the Union's Board to the full membership of the Union (GCX 23 B; D; E; F; G; H; I). The Union called a special meeting of its membership to hear these appeals on November 12, 1973. In addition to notifying the membership of this meeting, the communication dated October 26, 1973, prominently set forth the discipline that the Union had previously meted out to these supervisory members (RX 12).

II.
ARGUMENT.

In its Decision and Order, the Board adopted and affirmed the ALJ's finding that the executive producers, producers, associate producers, directors and story editors employed by the employer members of the Association were supervisors and management representatives within the meaning of the National Labor Relations Act, but additionally found that the executives and research directors so employed were also supervisors and management representatives. (Appendix 123; 139-140; 142-143; 169-170). The Board also adopted the finding of the ALJ that during the course of the strike these supervisory members of the Union performed no bargaining unit writing, but rather performed only their normal supervisory and management representative functions. (Appendix 123; 148; 169-170).

Finally, the Board affirmed the ALJ's conclusion that by its actions and conduct directed against its supervisory members the Union violated Section 8(b)(1)(B) of the Act (Appendix 123-124; 181).

As will be demonstrated below, the findings and conclusions of the Board are supported by substantial record evidence, *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). The application of both Board and judicial precedent to this evidence clearly support the Board's order, which order should therefore be enforced by this Court.

A. THE BOARD CORRECTLY FOUND THAT THE SUPERVISORY MEMBERS OF THE UNION EMPLOYED BY THE EMPLOYER MEMBERS OF THE ASSOCIATION ARE MANAGEMENT REPRESENTATIVES WITHIN THE MEANING OF SECTION 8(b)(1)(B) OF THE ACT.

There is overwhelming evidence herein, as summarized in Section I(B)(2)(a) and (b) above, that all of the affected executives, executive producers, producers, associate producers, directors, research directors and story editors adjust the grievances of employees or have the authority to do so and that many of the affected executives and producers even negotiate collective bargaining agreements on behalf of their employers, and that they are all thus management representatives within the meaning of Section 8(b)(1)(B).[23] See *National Labor Relations Board v. Rochester Musicians Association,* 514 F.2d 988 (CA 2, 1975)[24].

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[23]As the record evidence herein clearly establishes that the affected supervisors are actual Section 8(b)(1)(B) management representatives, it is unnecessary to discuss the Board's so-called "reservoir doctrine". *Toledo Locals Nos. 15-P and 272 of the Lithographers and Photo-Engravers International Union,* 175 NLRB 1072 (1969), enf. 437 F.2d 55 (CA 6, 1971); *Detroit Newspaper Printing Pressmen's Union No. 13,* 192 NLRB 106 (1971). *Cf. National Labor Relations Board v. Rochester Musicians Association, supra,* in which case the Administrative Law Judge refused to admit evidence with respect to the performance of management functions by the disciplined supervisory employee.

[24]The evidence is likewise clear and uncontroverted that these same executives, executive producers, producers, associate producers, directors, research directors and story editors hire all of the personnel necessary to the production of a motion picture or television film and responsibly direct this personnel in the pre-production, production and post-production efforts

(This footnote is continued on next page)

B. THE BOARD CORRECTLY FOUND THAT THE SUPERVISORY MEMBERS OF THE UNION EMPLOYED BY THE EMPLOYER MEMBERS OF THE ASSOCIATION PERFORMED NO BARGAINING UNIT WRITING DURING THE STRIKE AND WERE NOT THREATENED OR DISCIPLINED FOR THE PERFORMANCE OF SUCH WORK.

There is no evidence whatsoever in the record that the supervisory members of the Union employed by the employer members of the Association performed any bargaining unit writing work during the course of the Union's strike. Rather, all of the record evidence, as set forth in Section I(b)(3)(c) and (d), *supra,* is to the effect that these supervisors were neither asked to write, nor in fact performed any bargaining unit writing.

While some of the supervisors may have performed certain of the so-called "[a] through [h]" functions during the strike it is uncontroverted that these functions were specifically excluded from the scope of coverage of the applicable collective bargaining agreement entered into between the employer members and the Union. The Agreement clearly recognizes that the "[a] through [h]" functions could be and would be performed by supervisory personnel not covered by the provisions thereof. Thus, Article 14 of the Agreement specifically provided that the services of an individual "other than as a writer . . . shall not be subject to this Basic Agreement". And Article 1(b)(a)(2)

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required to create a finished motion picture or television film, and are thus supervisors within the meaning of Section 2(11) of the Act.

of the Agreement provided that the performance of the "[a] through [h]" functions by a producer, director, story editor or any other non-bargaining unit employee "shall not be subject to the agreement and such services shall not constitute such person a writer hereunder . . .". (Section I(b)(3)(a), *supra*).

Clearly neither the employer members of the Association nor the Union considered the "[a] through [h]" functions to be bargaining unit writing work covered by the Agreement. It would be ludicrous to contend that work that was thus excluded from the bargaining unit under the Agreement became bargaining unit work when the Agreement was unilaterally terminated by the Union.

Indeed, the Union too must have recognized this fact, for although a number of its strike rules specifically forbade writing for struck employers, none of the supervisory members were charged with having violated these rules. The Union did not even try to elicit any testimony during the disciplinary hearings held for the purpose of trying "offending" supervisory members that such members did in fact perform any bargaining unit writing during the strike. In fact, by its own admission, the Union was unconcerned with the nature of the services performed by the supervisor members during the strike, but regarded the crossing of the picket line for any purpose as grounds for the imposition of discipline. (Section I(B)(3)(d), *supra*).

C. THE BOARD CORRECTLY FOUND THAT THE UNION RESTRAINED AND COERCED THE EMPLOYER MEMBERS OF THE ASSOCIATION IN THEIR SELECTION OF MANAGEMENT REPRESENTATIVES IN VIOLATION OF SECTION 8(b)(1)(B) BY THREATENING, FINING AND OTHERWISE DISCIPLINING SUPERVISORY MEMBERS WHO CROSSED ITS PICKET LINE TO PERFORM THEIR NORMAL SUPERVISORY AND MANAGEMENT REPRESENTATIVE FUNCTIONS.

1. The Board Properly Found That the Union Directly Coerced the Employer Members of the Association in Their Selection of Management Representatives in Violation of Section 8(b)(1)(B).

Section 8(b)(1)(B) of the National Labor Relations Act provides as follows:

> "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances". 29 U.S.C. Section 158 (b)(1)(B)

There is clear and uncontroverted evidence herein, as more fully set forth in Section I(B)(3)(b), (c), (d) and (e), *supra*, that it was the avowed purpose of the Union, by its actions during and after the strike against the employer members of the Association, to shut down the entire motion picture and television industry by depriving it of key supervisory personnel, who during the course of the strike performed only their normal supervisory and management representative functions, which functions were related to numerous bargaining units which were neither represented by the Union nor were on strike. As found by the Administrative Law Judge, a finding adopted by the Board,

such actions clearly and directly violate Section 8(b)(1)(B) of the Act:

> "It is clear that Respondent's action in this case violated the plain meaning of the statute without the necessity of resort to statutory exegesis. To illustrate: A person performing the function of a director acts in a managerial or supervisory capacity, which normally includes the adjustment of grievances of actors, actresses, craft employees and others. One occupying the position of a producer normally has a similar capacity and similar duties with respect to employee grievances. In addition, if the film is being shot on distant location the producer has authority to negotiate on the spot agreements with local unions. Thus when Respondent prevented or sought to prevent, such hyphenate members from going to work in their managerial and supervisory capacities as producers and directors during the strike, *Respondent obviously coerced and restrained their employers in the selection of those specific producers and directors for the purpose of collective bargaining and the adjustment of grievances of employees working during the strike within the plain meaning of the statute.* Similarly, those persons employed as story editors or in like classifications perform executive functions normally, and appear to have done so during the strike. . . . *Respondent, by coercing or restraining persons in these classifications from going in to do their normal work thereby actually coerced and restrained* their employers from selecting those persons as the employers' representatives for the adjustment of grievances for collective bargaining during the strike". (Emphasis added). (Appendix 175-177).

2. Section 8(b)(1)(B) of the Act Proscribes Even Indirect Pressure Brought by a Union Against an Employer for the Purpose of Effecting His Selection of Management Representatives.

While the language of Section 8(b)(1)(B) makes clear that a labor organization is precluded from bringing direct pressure to bear against an employer in an effort to effect his selection of management representatives, judicial and administrative interpretations of this section make it equally clear that indirect pressure against an employer, brought to bear by means of pressure against his management representatives is also proscribed. As stated by the Court of Appeals for the District of Columbia:

> "Respondent's actions, including the citations, fines, and threats of citation, were designed to change the Charging Party's representatives from persons representing the viewpoint of management to persons responsive or subservient to Respondent's will. In enacting Section 8(b)(1)(B) Congress sought to prevent the very evil involved herein—union interference with an employer's control over its own representatives. *That Respondent may have* sought the substitution of attitudes rather than persons, and may have *exerted its pressures upon the Charging Party by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the Charging Party's control over its* representatives". (Emphasis added). *Meat Cutters Local 81 v. NLRB*, 458 F.2d 784 (CADC, 1972), enf. 185 NLRB 884.

See also *Dallas Mailers Local 143 v. NLRB*, 445 F.2d 730 (CADC, 1971), enf. 181 NLRB 286; *NLRB v. Sheet Metal Workers, Local 49*, 430 F.2d 1348 (CA 10, 1970), enf. 178 NLRB 139; *San Francisco-Oakland Mailers Union*, 172 NLRB 2173 (1968).

3. The Board Has Properly Interpreted the Decision of the Supreme Court in the Florida Power Case as Permitting the Discipline by a Union of Its Supervisory Members Who Cross Its Picket Lines Only Where They Have Done so for the Purpose of Performing Rank and File Struck Work.

In the recent case of *Typographical Union No. 6*, 216 NLRB No. 147, 88 LRRM 1384 (1975), the Board stated:

> "In Florida Power [*Florida Power & Light Co. v. IBEW, Local 641, et al.*, 417 U.S. 477 (1974)], the Supreme Court dealt with union discipline of supervisor-members who crossed picket lines to perform supervisory duties. In fact the majority noted that the supervisors who had performed only their regular duties during the strike had not been disciplined. . . . Therefore, nothing in the Supreme Court's Florida Power decision dictates the conclusion . . . that a union has a right to discipline a supervisor-member who performs any and any function during a strike. *The most that can be said is that Court sanctioned the disciplining of supervisor-members who performed rank-and-file struck work during a strike.* In this same vein, it is apparent to us that it was the performance of rank-and-file struck work by supervisor-members which the Supreme Court referred to as strikebreaking for which union sanctions

could be incurred. *Therefore under our view of Florida Power and its definition of strike-breaking, the only so-called 'price' that an employer must pay for permitting a supervisor to be a union member, is that the supervisor-member cannot, with immunity, cross union picket lines to perform rank-and-file work*". (Emphasis added). *Id.* at p. 1385-1386.

The Board's interpretation of the Supreme Court's Florida Power decision is clearly supported by a reading of the case itself. The issue before the Court was carefully framed by Justice Stewart, writing for the majority:

> "*The question to be decided is whether the unions committed unfair labor practices under §8 (b)(1)(B) when they disciplined their supervisor-members for crossing the picket lines and performing rank and file struck work* during lawful economic strikes against the companies". (Emphasis added). 417 U.S. at 792.

The holding of the Court in *Florida Power* was as narrow as the issue posed:

> ". . . it is certain that these supervisors were not engaged in collective bargaining or grievance adjustment, or in any activities related thereto, when they crossed union picket lines during an economic strike to engage in rank and file struck work . . . *for these reasons, we hold that the Respondent unions did not violate Section 8(b)(1)(B) of the Act when they disciplined their supervisor-members for performing rank-and-file struck work*". (Emphasis added). *Id.* at p. 813.

As stated by Justice White, writing for the minority:

> "I do not read the Court to say that §8(b)(1)(B) would allow a union to discipline supervisor-members for performing supervisory or management functions, as opposed to customary rank-and-file work, during a labor dispute". 417 U.S. at Footnote 2, p. 815.

Indeed, that the supervisors in *Florida Power* were disciplined for the performance of strike bargaining unit work rather than for the performance of their normal supervisory or management functions was duly noted by the lower court. Thus, the Court of Appeals for the District of Columbia in its *en banc* decision in *Electrical Workers (IBEW) v. NLRB*, 487 F.2d 1143 (1973), emphasized that:

> "*When a supervisor acts as such he is a representative of management, and as such he should be immune from union discipline. The Unions participating in the present case* conceded as much at oral argument when they *agreed that when a supervisory crosses a picket line to perform supervisory work he remains immune from discipline*". (Emphasis added). *Id.* at p. 1157.

As noted by the Supreme Court majority:

> "In *Illinois Bell . . . those who* did work during the strike but *performed only their regular* [supervisory and managerial] duties *were not disciplined* by the union. . . . In *Florida Power* the union *did not discipline* those who performed only *their normal supervisory functions*". (Emphasis added). 417 U.S. at Footnote 22, p. 812.

4. The Board Properly Applied the "Effect Test" of Florida Power in Finding That the Union Violated Section 8(b)(1)(B) by Threatening, Fining and Otherwise Disciplining Supervisory Members Who Crossed Its Picket Line to Perform Their Normal Supervisory and Management Representative Functions.

As stated by Justice Stewart in the majority opinion in *Florida Power:*

> ". . . a union's discipline of one of its members who is a supervisory employee can constitute a violation of §8(b)(1)(B) . . . when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as grievance adjuster or collective bargainer on behalf of the employer". *Id* at p. 804-805.

Applying this criteria, the Board has held that where a union's discipline of one of its supervisory members results from the performance of his supervisory functions such discipline constitutes a violation of Section 8(b)(1)(B) as it is likely and foreseeable to carry over to and have an effect upon the subsequent performance of his 8(b)(1)(B) functions, and conversely that where the discipline results from the performance of non-supervisory, rank and file functions, there is no such likely and foreseeable carry over effect and thus no 8(b)(1)(B) violation. Thus, whether a union's discipline of a supervisory member constitutes a violation of Section 8(b)(1)(B)

> ". . . clearly depends on an analysis of the activity engaged in by the supervisor during the period for which the discipline is imposed . . .". *Typographical Union No. 16,* 216 NLRB No. 149, 88 LRRM 1378, 1380 (1975).

See also *Typographical Union No. 6, supra; Bakery Workers, Local 24,* 216 NLRB No. 150, 88 LRRM 1390 (1975).

In *Typographical Union, No. 6, supra,* the Board noted:

> "*The application of the effect test* [*of Florida Power*] *is relatively straight-forward in extreme situations where the disciplined supervisor has engaged* either *only in the performance of supervisory activities (not limited to grievance adjustment or collective bargaining),* or only in the performance of rank-and-file struck work. *In the former there is clearly a violation since it is reasonably likely that an adverse effect will carry over to the supervisor's performance of his 8(b)(1)(B) duties where he is disciplined after having engaged only in the performance of supervisory duties*". (Emphasis added). *Id.* at p. 1380.

See also *Typographical Union, No. 6, supra,* at p. 1385.

An even more "straightforward" situation was presented to the Board by the instant case. For as more fully discussed in Section II(B), *supra,* the substantial, indeed uncontroverted, record evidence herein establishes that at the time they were threatened and disciplined by the Union the supervisory employees of the employer members of the Association were performing only their regular supervisory and management representative functions, including the negotiation of collective bargaining agreements and the adjustment of employee grievances. Thus, it was reasonably likely that an effect of the Union's discipline would be a tendency on the part of the supervisors to avoid taking

a position adverse to the Union in the future performance of their collective bargaining and grievance adjustment functions thereby interfering with the employer's control over them as management representatives, in violation of Section 8(b)(1)(B); see *San Francisco-Oakland Mailers Union, supra.* More than that, however, it was the Union's avowed purpose to use the discipline of its supervisory members as a means of achieving the proscribed effect by preventing them from performing their management representative functions for their employers during the course of the Union's strike, a clear 8(b)(1)(B) violation.

III.
CONCLUSION.

For all of the reasons stated above, it is respectfully submitted that the Decision and Order of the National Labor Relations Board should be enforced by this Court.

Dated: February 18, 1976.

Respectfully submitted,

MITCHELL, SILBERBERG & KNUPP,
HARRY J. KEATON,
ANDREW B. KAPLAN,
By ANDREW B. KAPLAN,

Attorneys for Association of Motion Picture and Television Producers, Inc.

Addendum.

ADDENDUM A.

29 U.S.C. Section 158(b)(1)(B) provides as follows:

"It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances".

29 U.S.C. Section 160(e) provides as follows:

"The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has been urged before the Board, its member, agent, agency, shall be considered by the court, unless the failure

or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact is supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28".

29 U.S.C. Section 160(f) provides as follows:

"Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive".

Nos. 75-4089, 75-4121

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-4089

AMERICAN BROADCASTING COMPANIES, INC., CBS INC., and NATIONAL BROADCASTING COMPANY, INC.,

Petitioner,

and

ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.,

Intervenor,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 75-4121

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.,

Intervenor,

vs.

WRITERS GUILD OF AMERICA, WEST, INC.,

Respondent.

CERTIFICATE OF SERVICE.

The undersigned hereby certifies that one copy each of the ANSWERING BRIEF OF THE ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC. and DESIGNATION OF RECORD

OF THE ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC., TO BE PRINTED IN THE APPENDIX in the above-captioned action has this day been served upon the following counsel at the addresses listed below:

Elliott Moore, Esq.
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Executed at Los Angeles, California on February 18, 1976.

/s/ Susan K. Anderson
SUSAN K. ANDERSON

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 6500 Flotilla Street, Los Angeles, California.

On March 29, 1976, I served the within ANSWERING BRIEF in re: "American Broadcasting Companies Inc. vs. National Labor Relations Board" in the United States Court of Appeals, for the Second Circuit, Nos. 75-4089 and 75-4121;

on the attorneys in said action, by placing 2 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

ELLIOTT MOORE, DEPUTY ASSOCIATE GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD, 1717 Pennsylvania Ave. NW, Washington DC 20570;
RICHARD FISHER, O'MELVENY & MYERS, 611 West 6th St., Los Angeles, CA 90017;
EMANUEL DANNETT, GRAUBARD, MOSKOVITZ, MC GOLDRICK, DANNETT & HOROWITZ, 345 Park Ave New York New York 10022;
LARRY A. CURTIS, MUSICK, PEELER & GARRETT, One Wilshire Blvd., Los Angeles, CA 90017;
JULIUS REICH, REICH, ADELL &CROST, 1411 W. Olympic Blvd. Suite 301, Los Angeles, CA 90015;

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on March 29, 1976 at Los Angeles, California

Kathleen Lenell

Service of the within and receipt of ~~a~~ copy thereof is hereby admitted this 5th day of March, A.D. 1976.

Proof of Service Enclosed